IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1948

Nos. 14 and 15

INTERNATIONAL UNION, U.A.W.A., A.F. of L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTALER, CLARENCE EHRMANN, HERBERT JACOBSEN, LOUIS LASS,

Petitioners,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE and J. E. FITZGIBBON, as Members of the Wisconsin Employment Relations Board; and BRIGGS & STRATTON CORPORATION, a corporation,

Respondents.

BRIEF
on behalf of EMPLOYERS ASSOCIATION of MIILWAUKEE, Amicus Curiae

LEON B. LAMFROM,
EGON W. PECK,
Attorneys for Employers Association of Milwaukee, Amicus Curiae.

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STATEMENT

The specific portion of the order of the Wisconsin Employment Relations Board which is challenged by petitioners requires them to cease and desist from:

> "Engaging in any concerted efforts to interfere with production by arbitrarily calling union meetings and inducing work stoppages during regularly scheduled working hours; or engaging in any other concerted effort to interfere with production of the

complainant except by leaving the premises in an orderly manner for the purpose of going on strike." (R. 17)

It will be noted that the Wisconsin Employment Relations Board preserved intact the right of petitioners to "interfere with production" by "leaving the premises in an orderly manner for the purpose of *going on strike.*" (Emphasis supplied)

It is the desire of Employers Association of Milwaukee, in this brief, as amicus curiae, to deal with the following points:

(1) The conduct engaged in by the petitioners here is not only not sanctioned by Section 7 of the National Labor Relations Act, but is actually contrary to the objects and purposes of the National Labor Relations Act.

(2) If Section 7 of the National Labor Relations Act were construed as rendering immune the conduct here engaged in, said section would be invalid under the due process provision of the Fifth Amendment of the Constitution of the United States.

POINT 1

The conduct engaged in by the petitioners here is not only not sanctioned by Section 7 of the National Labor Relations Act, but is actually contrary to the objects and purposes of the the National Labor Relations Act.

A. Preliminary Statement.

Section 7 of the National Labor Relations Act provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their

own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Petitioners contend that the order of the Board violates the rights of the petitioners set forth in said Section 7 of the National Labor Relations Act.

Petitioners here, as respondents below, made the same contention before the Supreme Court of Wisconsin. That court rejected the contention, and stated in this connection:

> "Respondents seem to argue that sec. 7 of the National Labor Relations Act by providing that 'employees shall have the right to self-organization * * * and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection,' gives to employees the right to engage in the 'concerted activities' here involved. Not so. That section does not authorize employees to use concerted activities which are in violation of law. The activities which they are authorized to use in concert are those which are lawful. The activities employed by the respondents in this case were activities which are unlawful under the law of Wisconsin. That only 'concerted activities' to secure a lawful objective are protected is held in *Wisconsin Employment Relations Board v. Milk & Etc. Ass'n.*, supra, in which certiorari was denied by the Supreme Court of the United States, 316 U.S. 668, and in *Retail Clerk's Union v. Wisconsin E.R.B.*, 242 Wis. 21, 6 N.W. (2d) 698. The same is in effect held in *Allen-Bradley Local v. Wisconsin E.R.B.*, 315 U.S. 740, 86 L. Ed. 1154.
>
> "If this is not true how are the states to police the activities of employees as well as employers? If the public interest is to be served there must be cooperation between Federal and state governments or the Federal government must take over the preserva-

tion of peace and good order if it is to effectively protect interstate commerce." (R. 119-129)

B. Section 7 of the Act must be construed in the light of the declared policy set forth in Section 1 of the Act.

As an aid to the construction of the scope of Section 7 of the National Labor Relations Act, we have the statement of the underlying findings and policy which prompted the adoption of that law by the Congress, set forth in Section 1 of the Act. Among the specific "findings" therein set forth are the following:

(1) The denial of the right of employees to organize and the refusal to accept the procedure of collective bargaining leads to strikes which has the effect of burdening or obstructing commerce.

(2) The inequality of bargaining power between employees who do not possess full freedom of association substantially burdens and affects the flow of commerce.

(3) Protection by law of the right of employees to organize and bargain collectively safe-guards commerce by removing certain recognized sources of industrial strife and unrest *"by encouraging practices fundamental to the friendly adjustment of industrial disputes."* (Emphasis supplied)

After making these basic findings the public policy sought to be served by the Act is then stated as follows:

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encoraging the practice and procedure of collective bargaining* and by protecting the exercise by workers of full freedom of association, self-organization, and designation of

representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." (Emphasis supplied)

If, as contended by the petitioners, the conduct here engaged in by them is protected under Section 7 of the Act, then Section 7 is wholly inconsistent with the declared policy set forth in Section 1 of the Act. While Section 1 announces that it is the declared policy of the Act to eliminate obstructions to the free flow of commerce "by encouraging the practice and procedure of collective bargaining," Section 7, if construed as contended by the petitioners, would sanction and encourage planned intermittent work stoppages as a substitute for collective bargaining. We would then have the anomaly of an act, designed to avoid work stoppages through the encouragement and protection of collective bargaining, actually protecting work stoppages designed to avoid real collective bargaining.

The activities here engaged in were not in the nature of a "strike," carried on to enforce specific demands, after collective bargaining was exhausted and had broken down. They were in the nature of collective "bludgeoning" designed to reach a desired result without collective bargaining. The record in this case makes it abundantly clear that the work stoppages here engaged in were not "concerted activities for the purpose of collective bargaining," within the meaning of Section 7 of the Act, but mass action *to avoid collective bargaining and in complete defiance of the authority of the employer to manage his business while remaining in the employer's service.*

In *Home Beneficial Life Insurance Company v. N.L.R.B.*, 159 F. 2d 280 (4th CCA), the union announced

its own schedule of days on which certain employees would report for work. In that case, as in the instant case, the union representatives carefully avoided the use of the word "strike" in characterizing the concerted activities engaged in by the employees represented by the union. After these activities were engaged in, the union subsquently staged a genuine strike. The court, after holding that the original activity did not amount to a strike dealt with the applicability of Section 7 of the National Labor Relations Act as follows:

> "The statute, (Sec. 7), expressly recognizes the right of employees 'to engage in concerted activities' but does not and could not confer on them the *right to engage en masse in unlawful activities,* or, to defy the authority of the employer to manage his business *while remaining in his service.* When they engage in an unlawful sit-down strike, as in (citing *Fansteel* case), they may be discharged by an employer, even though he has been guilty of unfair labor practices and when, as here, *they refuse to obey the rules laid down by a law-abiding management for the conduct of the business,* they must be discharged and their places may be permanently filled." (p. 284) (Emphasis supplied)

In this connection, see also decision of the Circuit Court of Appeals for the 7th Circuit, in *C. G. Conn Limited v. National Labor Relations Board,* 108 F. 2d 390. In that case, as here, it was contended that the mere work stoppages were protected conduct under the National Labor Relations Act. In disposing of that contention, the court stated, among other things, the following:

> *"We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him.* That is plainly what was sought to be done in this instance. It is not a situation in which

> employees *ceased* work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment." (p. 397) (Emphasis supplied).

In construing Section 7 of the Act, it should be borne in mind that, as stated in *Amalgamated Utility Workers v. Consolidated Edison Co.* (1940), 309 U.S. 261 262, 84 L. Ed. 738, Section 7 of the National Labor Relations Act created no new rights, and was merely definitive of rights already in existence.

Merely because a group of employees engage in a concert of activity, designed to force an employer to bow to their will, does not render such activity immune from regulation and control by the state under its police power. See *Allen-Bradley, Local 1111 v. W.E.R.B.* (1941) 315 U.S. 740, 86 L. Ed. 1154; *Hotel & R. E. Int. A. v. W.E. R.B.*, 315 U.S. 437, 86 L. Ed. 946. See also *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 83 L. Ed. 627.

The work stoppages and walkouts here indulged in were part and parcel of what the petitioners conceive to be a new "tactic" or "weapon",—a "softening-up process." That the collective bargaining which is protected under Section 7 must be "without restraint or coercion," is made abundantly clear in the *Fansteel Metallurgical* case, *supra*.

Section 7 of the National Labor Relations Act is not different from, or inconsistent with, the provisions of the Wisconsin Employment Peace Act under which the

order of the Wisconsin Employment Relations Board was issued in this case.

Section 111.04 of the Wisconsin Statutes provides:

> *"Section 111.04.* Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."

As pointed out by counsel for respondent Wisconsin Employment Relations Board, both the Wisconsin Employment Peace Act and the National Labor Relations Act indicate clearly that both the Federal Government and State of Wisconsin are in agreement that labor relations should be governed by mutual responsibility on the part of employer, employees, and their representatives, and that all parties should have a reciprocal obligation to subordinate their own self-interest to the public welfare. Manifestly, the conduct of the petitioners here involved was not only contrary to the rights and best interests of the employer, but in complete disregard of the right of the public to have the collective bargaining process used in good faith with the employees at work producing vitally needed commodities in the public interest, and to stop work only if the collective bargaining process had failed, and a strike was engaged in to enforce the demands involved in the collective bargaining which preceded the strike.

In essence, the contention of the petitioners here is that, under Section 7 of the National Labor Relations Act, union officials have the untrammeled and fully protected right to stop plant operations at will and interfere with

production by arbitrarily calling out employees during regular working hours for the asserted purpose of calling union meetings. It is impossible to reconcile this contention with the declaration of policy set forth in Section 1 of the Act that the Act was enacted to eliminate "obstructions to the free flow of commerce" and for the purpose of "encouraging the practice and procedure of collective bargaining."

If the tactics here employed are to be given judicial sanction, it would be tantamount to opening up a veritable "Pandora's Box,"—the evil effects of which could hardly be over-estimated. If the employees engaging in such tactics are to be cloaked with the same protection afforded striking employees, we respectfully submit that it would make a travesty of the declaration in Section 1 that the law was enacted for the purpose of "encouraging the practice and procedure of collective bargaining."

Under the Labor-Management Relations Act of 1947, unions are under precisely the same collective bargaining obligation which is applicable to employers. See Sections 8(a)(5) and 8(b)(3). If, then, the tactics here employed by the unions is held to be permissible under the Act, would not a similar tactic resorted to by employers be entitled to similar immunity?

Could anyone seriously contend that the sanctioning of such tactics would be consistent with the purpose of the Act to have uninterrupted production and to eliminate obstructions to the free flow of commerce? Instead, it would assure the very interruption of production which the Act was designed to prevent. Instead of encouraging the utilization of free collective bargaining, the sanctioning of the tactic here involved would make collective bargaining, in any real sense, an impossibility.

Collective bargaining can work only when engaged in by relative equals in an atmosphere free from force and duress. If this is true, the sanctioning of the tactic here engaged in would have the effect of eliminating the very essentials of collective bargaining. Collective "bludgeoning" would soon replace collective "bargaining." "Negotiations" between unions and employers would then in fact be trials by *combat*.

We cannot believe that such a result is in the public interest, or consistent with the congressional declaration contained in Section 1 of the National Labor Relations Act. As pointed out in *N.L.R.B. v. Draper Corp.*, 145 F. 2d 199, at p. 203,—

> "The purpose of the act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace."

It is perfectly clear that the tactic here employed is a particularly harmful and demoralizing weapon, the necessary effect of which is to burden and obstruct commerce and to destroy the collective bargaining which it is the purpose of the Act to promote.

POINT 2

If Section 7 of the National Labor Relations Act were construed as rendering immune the conduct here engaged in, said section would be invalid under the due process provision of the Fifth Amendment of the Constitution of the United States.

Industry cannot function and employers cannot operate their plants properly unless they have reasonable control over their production schedules. They cannot have this

control if, when their plants are in operation, the employees are free to collectively stop and start their work at will. Production cannot be started and stopped the way you start and stop the flow of water by merely turning a faucet. Industrial plants must be either at work or shut down.

If the tactic here involved has special statutory immunity, employees can walk into the plant at the opening of a shift, walk out about 15 minutes thereafter, return about one-half hour later, and continue that process with such modifications as the employees themselves, or the union representing them, might determine. It will be readily seen that complete loss of functional use of the employer's property would soon result, production schedules and filling of orders placed by customers would be mere pious hopes, and industrial chaos would be inevitable.

If, as petitioners contend, the tactic here employed is within the protection of Section 7 of the National Labor Relations Act, the constitutional right to conduct a lawful business in a lawful manner will have no further substance or reality. Then, in truth, the "right" of an employer to conduct his business will no longer be a vested right, but will be only by sufferance, and without any remedy against the usurpation of the control of his business by others. In the consideration of such a result, we refer to the statement of Chief Justice Marshall in *Marbury v. Madison,* 1 Cranch 137, 163, where he said:

> "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of vested rights."

See also *Truax v. Corrigan*, 257 U.S. 312, 66 L. Ed. 254, where this court stated:

> "To give operation to a statute whereby serious losses inflicted by such unlawful means are in effect made remediless, is, we think, to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law."

We fully recognize the legitimate rights of employees and of the unions which represent them. In the last analysis, however, those rights are subject to the familiar maxim: *"Sic utere tuo ut alienum non laedas,"*—So use your own property as not to injure the rights of another. This was clearly stated by this court in *Hitchman Coal & Coke v. Mitchell*, 245 U.S. 229, 253-254, 62 L.Ed. 260:

> "Defendants set up, by way of justification or excuse, the right of workingmen to form unions, and to enlarge their membership by inviting other workingmen to join. The right is freely conceded, provided the objects of the union be proper and legitimate, which we assume to be true, in a general sense, with respect to the union here in question. * * * The cardinal error of defendants' position lies in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others. (citing cases) The familiar maxim 'Sic utere tuo ut alienum non laedas'—literally translated, 'So use your own property as not to injure that of another person,' but by more proper interpretation, 'so as not to injure *the rights of another*' * * * — applies to conflicting rights of every description. For example, where two or more persons are entitled to use the same road or passage, each one, in using it, is under a duty to exercise care not to interfere with its use by the others, or to damage them while they are using it."

Some observations as to the relationship of employers and employees and unions and the general public which this appeal brings to this court, we think, may well be made at this time.

It seems to us that in the construction of the National Labor Relations Act, contended for by the petitioners, we have clearly reached the point where "one man's liberty ends where another's begins."

The facts in the case call for the application of the rule of all human conduct, "FAIR PLAY." Beginning with the Federal Constitution, the rule of "fair play," as understood by right-thinking people, was followed in the legislative history of Congress and the state legislatures, and in the judicial development of this country.

This would cease to be so if the construction of the National Labor Relations Act contended for by petitioners were adopted, and held to be constitutionally valid. If that construction were adopted and held valid, in the very nature of things, a devastating condition would result through the placing in the hands of organized labor of an instrument for the destruction of rights, not called for by statutory construction, not supported by any realistic concept of constitutional law, not within any declared public policy, and certainly not in keeping with any responsible theory of "fair play."

In the hands of unthinking and wilful men, under the guise of right, it could well mean industrial stagnation and complete demoralization. This would be so because it would give the unions the potential right to bring about a condition in which the owners of plants in the last analysis would own brick and mortar, idle machinery and equipment, and a useless good will. Manifestly, our economic life could no longer be maintained under such conditions.

While we are dealing here with the Fifth Amendment to the Constitution, which is applicable only to the Federal government, the "due process" provision is analogous to the "due process" provision contained in the Fourteenth Amendment applicable to the several states. Accordingly, the various decisions throwing light upon the significance of the "due process" provision in the Fourteenth Amendment are of interest here. Particularly pertinent here is the observation by Mr. Chief Justice Taft in *Truax v. Corrigan, supra.*

> "It is argued that while the right to conduct a lawful business is property, the conditions surrounding that business, such as regulations of the state for maintaining peace, good order, and protection against disorder, are matters in which no person has a vested right. The conclusion to which this inevitably leads in this case is that the state may withdraw all protection to a property right by civil or criminal action for its wrongful injury, if the injury is not caused by violence. * * * It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the 14th Amendment is intended to preserve, *and that a purely arbitrary or capricious exercise of that power, whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles.*" (Emphasis supplied) (pp. 329-330)

In *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278, 76 L. Ed. 747, this court said:

> "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that un-

der review, cannot be upheld consistent with the 14th amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'"

In *Liggett Co. v. Baldrige*, 278 U.S. 105, 73 L. Ed. 204, this court said, at p. 113:

> "A state cannot, 'under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.'"

See also:

> *Butchers' Union Slaughter House and Live Stock Landing Company v. Crescent City Live Stock Landing and Slaughter-House Company*, 111 U. S. 746, 764-765, 28 L. Ed. 585.
>
> *Burns Baking Co. v. Bryan*, 264 U.S. 504, 68 L. Ed. 813, 32 A.L.R. 661.

In the view which we take of the constitutional issues here involved, we assert, as did the court in *The Oakmar, D.C. Md.*, 2 F. Supp. 650:

> "Labor and capital, employer and employee, stand upon the same basis before a Federal Court, with respect to constitutional rights."

CONCLUSION

It is the primary contention of the Employers Association of Milwaukee that the conduct here involved, which was proscribed by the order of the Wisconsin Employment Relations Board, not only does not conflict with Section 7 of the National Labor Relations Act, but is in

furtherance of the public policy sought to be served by it. If, however, the statute is construed as contended by the petitioners here, it is our position that Section 7 of the National Labor Relations Act must fall because it is in conflict with the due process provision of the Fifth Amendment of the Federal Constitution.

Accordingly, the decision of the Supreme Court of the State of Wisconsin should be affirmed.

Respectfully submitted,

LEON B. LAMFROM,
EGON W. PECK,
Attorneys for Employers Association of Milwaukee, Amicus Curiae.